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Barristers and Solicitors

## **ODSP: What Every Estate Solicitor Needs to Know**

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## THE ONTARIO DISABILITY SUPPORT PROGRAM

The Ontario Disability Support Program ("ODSP") is a social assistance program that provides assistance for people with disabilities.

Introduced in 1997, the provincial program provides assistance beyond that historically provided through Ontario's welfare program. Previously, the *Family Benefits Act* contained provisions which provided for persons with disabilities. However, the ODSP, which was created by the *Ontario Disability Support Program Act, 1997*<sup>1</sup> ("the Act") proclaimed in 1998, superceded the *Family Benefits Act* and made specific provisions for persons with disabilities.

There are approximately 220,000 "benefit units", with 303,000 "beneficiaries" in Ontario currently receiving ODSP benefits.<sup>2</sup>

### Benefits

The ODSP provides two potential types of support: income support and employment support. Income support provides financial assistance to help with drug, dental and accommodation costs and other special needs expenses. Employment support helps people with disabilities to prepare for, find and maintain employment.

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<sup>1</sup> S.O. 1997, c. 25

<sup>2</sup> *Ontario Social Assistance Quarterly Statistical Report, September 2006*, available at [www.mcass.gov.on.ca/mcass/English/publications/?pillar=social&program=odsp](http://www.mcass.gov.on.ca/mcass/English/publications/?pillar=social&program=odsp)

The quantum of support payable under the ODSP varies, depending on the number of people in the “benefit unit”, being the disabled persons, his or her spouse, and dependants. At present, the maximum payable is \$979 per month for a single person who is a homeowner or tenant. The quantum of support varies based on shelter costs, and the number of individuals in the benefit unit.

ODSP recipients also receive a drug card, a basic dental plan, and other health and disability related benefits. These are often of greater value than the income support.

While seemingly modest, over the course of a lifetime the benefits to a disabled individual from ODSP can be substantial. An effective estate plan will maximize these benefits, while preserving the estate for the disabled individual (or other beneficiaries).

### Eligibility

The application for ODSP benefits is a two-step process that involves an initial screening to determine basic *financial* eligibility, followed by a process for establishing *medical* eligibility.

### Financial eligibility

Income support is available only to Ontario residents who:

- Have expenses and other budgetary needs that exceed their income;
- Whose assets do not exceed a base of \$5,000 for a single person, plus \$2,500 for a spouse and \$500 for every non-spouse dependant;
- Who provide all required information to determine eligibility; and
- Meet any other prescribed eligibility conditions.

The Act and the regulations prescribed asset limits for a "benefit units". The limits are \$5,000 for a single recipient, \$7,500 for a couple, and \$500 each dependent other than a spouse.

A number of assets are exempt. It is important for the estates practitioner to note what these assets are, as they provide planning options. Exempt assets include:

- A principal residence, or the proceeds from the sale of a principal residence, provided that the proceeds are used for the purchase of another principal residence within 12 months from sale;

- An interest in a second property, if the Director is satisfied that the property is necessary for the health or well-being of a member of the benefit unit. For example, a second property that is a cottage could be considered necessary for health and well-being. Further, a second property in a country with currency restrictions that cannot be liquidated or where proceeds cannot be remitted outside of the country may also be exempted
- Payments made under the Ontario Disaster Relief Assistance Program;
- One motor vehicle, regardless of value, and a second vehicle if the net value is no more than \$15,000 and it is required to permit a dependent of the applicant to maintain employment;
- Inheritances or the proceeds of a life insurance policy which are placed in trust for the benefit of that person come up to a limit of \$100,000. Interest and dividends earned on the capital amount may be reinvested in the trust provided the capital does not exceed \$100,000. (This "non-Henson Trust" is discussed, below.)
- The total cash surrender value held in an insurance policy, to a limit of \$100,000;
- Compensation awards for injury or death, up to a maximum of \$100,000 (although the interest earned on this amount will be considered income);
- Prepaid funerals for an applicant or spouse;

- Student loans, grants, awards or bursaries, as long as the person for whom the loan was provided remains in attendance in the program of study;
- Registered Education Savings Plans;
- The amount remaining to be paid to a member of the benefit unit under a mortgage or agreement for sale (however, actual payments received qualify as income);
- Special government compensation payments, such as the Helpline Reconciliation
- Model Agreement, the Multi-Provincial/Territorial Assistance Program Agreement, the Grandview Agreement, the Ontario Hepatitis C Compensation Plan, the Walkerton Compensation Plan, and certain other governmental payments (subject to certain limitations);
- Business assets of a self employed applicant or member of the benefit units, up to \$20,000;
- Tools of the trade that are essential to the operation of a business or the employment of a member of the benefit unit;
- Assets derived from a dependent child's earnings;

- Assets derived from the earnings of a dependent adult who is attending secondary school full time;
- "Locked in" RRSPs;
- The income from "locked in" RRSPs in certain circumstances;
- Loans for the purpose of purchasing exempt assets;
- All interest earned on assets within the assets ceiling is excluded from income

In addition, a qualified recipient or other member of the benefit unit is entitled to receive up to \$5,000 during any consecutive 12 month period. This amount is from all sources, including income, interest, money from trusts, or gifts that are not otherwise exempt. For example, a gift of a disability related item or service is exempt, as is an advance from a trust used for a disability related item or service.

As can be seen, the list of exempt assets is long and varied. With these assets being exempt, there is significant room for creative planning in order to provide for and benefit the disabled beneficiary without affecting the beneficiary's ODSP entitlement. These exempt assets can be purchased by or on behalf of the disabled beneficiary.

However, the ramifications of such a purchase must be considered. For example, while a residence may be exempt, the disabled beneficiary will have to have sufficient income to pay the expenses of maintaining the home. This income might put him or her over the income threshold.

An ODSP recipient may become ineligible if the income or asset thresholds are exceeded. The period of ineligibility will continue while the condition persists. If the asset threshold is exceeded, the ODSP recipient is disqualified. Thereafter, the ODSP recipient must reapply. However, the recipient may be able to take advantage of "rapid reinstatement" and the complete application process may not be required. If the income threshold is exceeded, benefits are reduced dollar for dollar.

The regulations provide the Director with the discretion to determine that an applicant is not eligible for income support, or to reduce income support if an assignment or transfer of assets was made for inadequate consideration to or for the purpose of qualifying for ODSP. This precludes an applicant from "giving away" assets in order to qualify. The value of the asset is attributed to the applicant.

ODSP assistance is only available for those over 18 years of age, and generally continues only to the age of 65, unless the recipient is ineligible for Old Age Security.

### Medical eligibility

The Act stipulates what a "disability" is for the purposes of the Act. A person is considered to have a disability if:

- He or she suffers from a continuous or recurrent physical or mental impairment;
- The impairment is substantial in nature;
- The impairment is expected to last a year or more;
- The impairment's direct and cumulative effect on the person's ability to attend to his or her personal care, function in the community and function in the workplace, results in a substantial restriction in one or more of these activities of daily living; and
- The impairment, duration and restriction on activities of daily living must be verified by a person with prescribed qualifications (ie. is typically a member of a health profession that has been approved by the Director of the ODSP).

Case law<sup>3</sup> has held that the legislation is designed to assist individuals whose disabilities are "significant" but not necessarily "severe". Further, the applicant must be considered in the context of their specific situation, and not as merely a set of abstract medical conditions. Finally, the courts have held that the ODSPA is to be interpreted broadly and liberally, and that any ambiguities in interpretation should be resolved in favour of the applicant.<sup>4</sup>

Income support will be disallowed for a person who is addicted to or dependent upon alcohol, illicit drugs, or other "chemically acted substance", and the disability is caused

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<sup>3</sup> *Gray v. Director of ODSP* (April 25, 2002), Docket No. C37008 (C.A.)

<sup>4</sup> The Income Security Advocacy Centre, in "Denial by Design...the Ontario Disability Support Program", p. 17 notes that "In practice, however it appears that the [Disability Adjudication Unit of the ODSP] only rarely applies the legislated definition of disability in the manner suggested in *Gray*."

by the dependency, unless the individual has a substantial mental or physical impairment.

As can be expected, the application process is quite technical, and is a difficult one. Much litigation has arisen with respect to whether a particular individual qualifies medically and financially for ODSP.<sup>5</sup> The OSPSA provides a detailed mechanism for the review and appeal of income support decisions.

### ADVISING THE CLIENT

An important role for the professional advisor is to be able to identify where ODSP planning devices need to be considered. The client must be made comfortable enough so that they can openly discuss their needs and concerns. Many clients will not volunteer information regarding a relative's disability, so that appropriate provision can be made.

Many clients may not be familiar with the provisions of the ODSP, and the effect that their estate plan may have on a disabled beneficiary. Some might not provide at all for such a beneficiary, so as to not adversely effect the beneficiary's entitlement to government support. Some may wish to simply provide equally for all beneficiaries, and

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<sup>5</sup>In "Denial by Design...the Ontario Disability Support Program", Income Security Advocacy Centre, 2003, the ISAC notes that "The ODSPA was purported to be based on extensive consultation with the disabled community and, according to the Minister of Community and Social Services at the time, marked the 'start of a new era of fairer treatment and more opportunity' for these people. The reality has been very different.... Individuals are caught in an exceedingly complex application process of lengthy medical reports, tight timelines, delays and unfair, unaccountable adjudication. ...It is a system that would be difficult for anyone to navigate. For people with special needs, the barriers are often insurmountable." P. 1

not take the disability into account, either not knowing of or not concerning themselves with the effect this may have on the disabled beneficiary and their ODSP entitlement.

Note that failing to provide for a disabled beneficiary who qualifies as a "dependant" under the dependant's relief (Part V) provisions of the *Succession Law Reform Act* may trigger a claim. This claim can be brought by the dependant, or someone acting on his or her behalf. Further, s. 58(3) of the *Succession Law Reform Act* allows the Ministry of Community and Social Services to bring a dependant's relief application on behalf of an ODSP recipient.

If a disabled potential beneficiary is identified, the advisor must make further inquiry. Specifics of the beneficiary's circumstances should be obtained so that the advisor can properly advise as to what an appropriate estate plan might be. Inquiries should be made with respect to the disabilities, abilities, needs, education, employability, medical condition, possible future changes to that condition, living arrangements, assets, sources of income, and personal relationships of the disabled beneficiary.

In some cases, it might be advisable to obtain a report from a family doctor or social worker, so as to corroborate or expand on the information that you are able to obtain from your client.

Depending upon the nature of the disability, it might also be advisable to speak to the disabled person, in order to determine their needs, circumstances and future plans.

### The Henson Trust

When planning for a testator who has a disabled beneficiary, the testator should consider taking advantage of a fully discretionary trust. The establishment of such a trust can allow for some provision to a disabled beneficiary, while not disqualifying the beneficiary from ODSP benefits.

The terms of the discretionary trust must have the effect that the beneficiary does not have a vested interest in the income or capital of the trust: the trust must be truly discretionary, and the trustee must have a mere power to benefit the beneficiary.

Thus, a term of a will that establishes a trust in favour of A and B (where A is a disabled ODSP recipient), with the power to distribute to A and B may allow for distributions to A while not compelling any distribution should be considered. There must also be a remainderman other than the ODSP recipient.

Such a trust was considered in the leading case of *The Minister of Community and Social Services v. Henson*<sup>6</sup>. In this case, a discretionary trust was found to not disentitle a benefit recipient from receiving ODSP-type benefits.

In *Henson*, a father created a discretionary trust, with the sole income beneficiary being his disabled daughter, who was receiving Family Benefits. The trustee had absolute discretion with respect to the trust, and the payment of income and capital. The residual beneficiary of the trust was a charity.

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<sup>6</sup> (1987), 28 E.T.R. 131 (Div. Ct.); (1989), 36 E.T.R. 192 (C.A.)

The Minister took the position that the trust fund was an asset of the daughter, and stopped the payment of benefits. The Social Assistance Review Board, the Divisional Court and the Court of Appeal all held that the trust was truly discretionary, and that the daughter had no right to demand the payment of income or capital from the trust, and thus the trust was not an asset available to her. She was, therefore, not disqualified from receiving benefits, notwithstanding the existence of the trust for her benefit.

As homage to this landmark decision, such trusts for disabled beneficiaries are often referred to as "Henson Trusts".

ODSP guidelines now expressly provide that funds held in a true absolute discretionary trust are not considered assets for ODSP purposes. The significant benefit of such a trust is that there is no restriction on its value, and its value can therefore exceed the \$100,000 threshold imposed on trusts established with funds received from an estate or insurance policy.

To be a valid Henson Trust or discretionary trust, the trust should have the following important components:

Absolute Discretion to Trustee

It is important that the disabled beneficiary not have any vested interest in the trust. Any enforceable interest on the part of the beneficiary may disqualify him or her from ODSP benefits.

The even hand rule should expressly be excluded, so that no beneficiary can assert any enforceable interest under the trust.

### Accumulation of Income

The Henson Trust drafter should consider the accumulation of income and the effect of the *Accumulations Act*. In certain cases, the trust should provide that the accumulated income is to be paid out to the ODSP recipient and/or an alternate beneficiary, again at the discretion of the trustee. If no beneficiary of the accumulation is named, the income may be payable on an intestacy, and may disqualify the ODSP recipient.

### Remainderman

There must be another interest in the trust in addition to the disabled beneficiary. The alternate beneficiary designation is essential in order to ensure that the disabled beneficiary is not deemed to be entitled to the trust on the basis of the Rule in *Saunders v. Vautier*. Without the gift over, the disabled beneficiary may be deemed to be entitled to collapse the trust, thus giving him or her immediate benefit.

In *Drafting Wills in Ontario: A Lawyer's Practical Guide*<sup>7</sup>, the authors observe that many Henson Trust precedents also include a specific reference to preserving entitlement to government benefits. They state that such a reference is unnecessary as it adds nothing to trustee's powers. They also caution that it may "flag the trust for unwanted attention

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<sup>7</sup> Solnik, Robyn and Thompson, Mary-Alice, 2003, CCH Canada Limited,

by the Ministry.”<sup>8</sup> I suggest that there is nothing improper in setting out such a purpose, and, stepping back, there is nothing wrong with such a trust. The trust must be disclosed, where it will receive the attention it deserves in order to ensure that it is truly discretionary. Further, there is some benefit of ensuring that the trustee is mindful of the intent of the trust that is being bestowed.

The Henson Trust can be settled during the lifetime of the settler, or can be a term of the person's will. Attached as Schedule “A” is a precedent will term that establishes a Henson Trust. Attached as Schedule “B” is a precedent of an inter vivos Henson Trust.

The added benefit of establishing a trust is that allows the testator to ensure that the funds will be properly managed in circumstances where the beneficiary is unable to do so. Consideration of a trust vehicle should be made even where there are no ODSP issues, but a beneficiary who may not be able to manage property.

### The \$100,000 Disability Expense Trust<sup>9</sup>

An applicant, or member of a benefit unit is entitled to put monies derived from an inheritance or the proceeds of a life insurance policy into a trust. These funds, up to a maximum value of \$100,000, will not be considered assets for ODSP purposes.

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<sup>8</sup> Ibid., at p. 164

<sup>9</sup> Sometimes referred to as a Maintenance Trust, a Disability Maintenance Trust, or a Non-Henson Trust.

This trust is distinct from a Henson Trust in that the funds may be received directly by the recipient and subsequently placed into the trust. Such a vehicle is available to shelter the funds were the testator did not make any attempt to do so.

A recipient is given six months in order to establish such a trust. The ODSP recipient has an obligation to advise the ODSP of the receipt of the inheritance or insurance policy proceeds, and should also advise of the intention to establish the trust within six months of the receipt of the funds. Failure to notify ODSP, or failure to establish the trust within the 6 month period will likely resulting an interruption of benefits.

Matters are complicated where the nature of the disability renders the ODSP recipient incapable of giving instructions. In such a case, the attorney for the incapable person under a valid Power of Attorney may give instructions, and establish the trust. If there is no attorney, a guardian of property will be required, and a formal application to the court for such an appointment will have to be made.

A precedent for a disability expense trust deed is attached as Schedule "C".<sup>10</sup>

Payments out of this trust, be they capital or interest that are not otherwise exempt are allowed, up to the maximum \$5,000 per year limit.

In addition, in a non Henson Trust, any accrued interest will be taken into account in calculating the \$100,000 trust capital limit.

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<sup>10</sup> From Beatty, Harry, "Advising the Ontario Disability Support Program Recipient or Applicant who has received an Inheritance or Insurance Proceeds", January 2004

Like all trustee appointments, the choice of a trustee under either trust is important. However, the demands upon the trustee and the considerations to take into account, and the sensitivity required to be brought to the task where there is a disabled beneficiary are particularly onerous. As noted, the discretion on the part of the trustee under a Henson Trust must be absolute. Therefore, careful consideration of an appropriate trustee is required.

The age and health of the trustee should also be considered, as the trust might be in existence for some time. In addition, the trustee should be aware of, or capable of understanding, the rules that govern the ODSP, and the effect that the administration of the trust may have on the disabled beneficiary. The trustee should know and care about the well-being of the disabled beneficiary, and should be prepared to take steps to maximize that well-being.

The possibility of a corporate trustee, or multiple trustees should be explored.

The testator should carefully consider whether it is advisable to appoint a trustee who is also a residual beneficiary of the trust, due to the obvious conflicts that might arise as a result of that appointment.

SCHEDULE "A"

e) If my son, ALEXANDER , survives me, I DIRECT my Trustee to set aside the residue of my estate and keep it invested. My Trustee shall pay to or apply for the benefit of ALEXANDER , the whole or such part of the net income derived from the residue of my estate or from the part thereof from time to time remaining in trust, together with so much of the capital thereof to and or for the benefit of my son, ALEXANDER as my Trustee shall in the exercise of his absolute and unfettered discretion consider advisable from time to time. Any income not so paid in any year shall be accumulated by my Trustee and added to the capital of such share to be dealt with as part thereof, provided, however, that if it becomes unlawful for my Trustee to continue such accumulation of income, then the income not so paid in any year to or for the benefit of my said son, ALEXANDER shall be paid to NAME OF ALTERNATE CHARITY. On the death of my son ALEXANDER , I direct my Trustee to divide the residue of my estate or the part of the residue of my estate then remaining shall be divided equally among the following charities:

- i) xxxxxx
- ii) xxxxx
- iii) xxxxx
- iv) xxxxxx

The residue of my estate and the income therefrom shall not vest in ALEXANDER and the only interest he shall have therein shall be the payments actually made to him, or on his behalf, and received by him or for his benefit therefrom. Without in anyway binding the discretion of my Trustee, it is my wish that in exercising his discretion in accordance with the provisions of this paragraph, my Trustee take account of and in so far as he may consider it advisable take such steps as will maximize the benefits which ALEXANDER would receive from other sources if payments from the income and capital of the residue of my estate were not paid to him for his own benefit or if such

payments were limited to an amount or time. In order to maximize such benefits, I specifically authorize my Trustee to make payments varying in amounts and at such time, or times, as my Trustee in the exercise of his absolute discretion may consider in the best interests of ALEXANDER .

f) If my son, ALEXANDER , does not survive me, I direct my Trustee to distribute the residue of my estate equally among the following charities:

- i) xxxxx
- ii) xxxxx
- iii) xxxxx
- iv) xxxxx
- v) xxxxx



- c. "Distribution Date" shall be the date of death of the Beneficiary;
- d. "Income Tax Act" means the *Income Tax Act* (Canada) and any applicable legislation of any province or other jurisdiction that imposes a tax on income or capital gains;
- e. "Person" includes a corporation, trust or partnership as well as an individual;
- f. "Trustee" at any time shall mean the person or persons holding office as Trustee of this Trust at such time;
- g. "Trust Fund" means any property, including any investments made by the Trustee, that may be held any time by the Trustee pursuant to this Deed and any undistributed income from such property.

Where the plural form is used in this Trust Deed, it includes the singular form, and where the singular form is used, it includes the plural form.

## 2. SETTLEMENT

By way of settlement for the benefit of the Beneficiary hereinbefore named, the Settlor covenants and agrees to make, and does hereby make, a gift and settlement upon the Trustee of FORTY THOUSAND DOLLARS (\$40,000.00) which shall be delivered to the Trustee to be used by her in the manner hereinafter provided, and the Settlor further covenants and agrees that the said gift and settlement of the said \$40,000.00 is hereby made irrevocably and absolutely in favour of the Trustee, upon the trusts contained herein. It is agreed that the Settlor shall not have any liabilities or obligations hereunder other than the obligation and covenant to make a gift of \$40,000.00 to the Trustee as provided herein.

## 3. DISTRIBUTION OF CAPITAL AND INCOME UNTIL DISTRIBUTION DATE

Until the Distribution Date the Trustee shall have an unfettered discretion to distribute all or any part of the net annual income and all or any part of the capital of the Trust Fund to or for the benefit of the Beneficiary, at such time or times as the Trustee shall deem advisable or expedient. Any part of the net annual income that is not distributed to the Beneficiary shall be accumulated and shall form part of the capital of the Trust Fund. Provided that if after the expiration of twenty-one (21) years from the date of this Agreement (herein referred to as the "Income Distribution Date") the Trustee is still holding the trust fund, she shall

thenceforth pay to or apply for the benefit of the Beneficiary or her issue or the Alternative Beneficiaries or any of them in such proportions as she may deem appropriate in her absolute discretion, the whole of the net income, if any, derived from the Trust Fund. Notwithstanding the foregoing, the capital of the Trust Fund and the income therefrom shall not vest in the Beneficiary and the only interest she shall have therein shall be the payments actually made to her, or on her behalf, and received by her or for her benefit therefrom.

Without in any way binding the discretion of the Trustee when exercising her discretion in accordance with the provisions of this paragraph, the Trustee shall take such steps as will maximize the benefits which the Beneficiary would receive from other sources if payments from the income and capital of the Trust Fund paid pursuant to this paragraph were not paid to her, or if such payments were limited as to amount or time. In order to maximize such benefits, the Trustee is authorized to make payments varying in amount and at some time or times as the Trustee in the exercise of an absolute discretion considers advisable keeping in mind the comfort and welfare of the Beneficiary a primary consideration.

4. **DISTRIBUTION ON TERMINATION OF TRUST**

Upon the Distribution Date the Trustee shall distribute the Trust Fund then remaining to or for the benefit of the issue of the Beneficiary, then alive in equal shares *per stirpes*. In the event that the Beneficiary dies leaving no issue, the Trustee shall distribute the Trust Fund, in equal shares to those of the Alternative Beneficiaries who are alive at the Distribution Date. If no Alternative Beneficiaries are alive on the Distribution Date, the Trust Fund shall be distributed among the issue of the alternative Beneficiaries alive on the Distribution Date in equal shares *per stirpes*.

5. **MINORS**

The Trustee may make any distributions of income or capital pursuant to this Deed to any Beneficiary who is under the legal age of majority by distributing the same to a parent or legal or *de facto* guardian of such beneficiary. A receipt given to the Trustee by any such parent or guardian shall be a full discharge of the Trustee with respect to a distribution made to such person. Alternatively, the Trustee may retain and invest the amount or the property otherwise distributed to such Beneficiary until he or she attains the legal age of majority. The Trustee shall have full power and discretion to pay, transfer or apply all of any part of any such amount or property retained by her, or of the income therefrom, to or for the support or benefit of such Beneficiary at any time or times until her or she attains the legal age of majority when such amount or property or the part remaining, if any, shall be paid or transferred to such Beneficiary.

6. **POWER OF TRUSTEE**

a. **Additions of the Trust Fund**

To accept as an addition to the Trust Fund any gift of money or other property that any person may donate or lend to the Trust at any time or times, either in his or her lifetime or by testamentary disposition;

b. **Investments**

To invest and reinvest any money forming part of the Trust Fund in any investments of any kind whatever without being limited to investments authorized by law for a Trustee;

c. **Acquisition of other Property**

To purchase or otherwise acquire and hold as part of the Trust Fund any real or personal property whether such property is or is not capable of producing income;

d. **Disposition of Trust Property**

To sell, assign, exchange, lease, grant any option or otherwise dispose of the whole or any part of the Trust Fund in any manner for such consideration and on such terms and conditions as the Trustee may deem advisable or expedient;

e. **Borrowing**

To borrow funds from any bank, trust company or other financial institution, person or source, including the Settlor or the Trustee, on such terms and conditions as the Trustee may deem advisable or expedient;

f. **Pledge**

To pledge, charge, mortgage or give any other forms of security on all or any part of the Trust Fund and to renew any such security on such terms and conditions as the Trustee may deem advisable or expedient;

g. **Insurance**

To purchase or otherwise acquire any policy of insurance on the life of any person, to pay any premiums falling due under such policy and to deal

with such policy and any proceeds thereof as part of the Trust Fund in such manner as the Trustee may deem advisable or expedient;

**h. Rights Incidental to Ownership**

To exercise any voting rights and other rights incidental to the ownership of any investments or other property included in the Trust Fund, to grant proxies and to participate in any plan or arrangement for the dissolution, merger or reorganization of any corporation or partnership whose shares, bonds, interests or securities are included in the Trust Fund and generally to do any act with respect to the investments or other property included in the Trust Fund that would be within her power if she were the absolute owner of such investments or other property;

**i. Agreements**

To enter into any agreement or other transaction with respect to any investments or other property included in the Trust Fund upon such terms and conditions as the Trustee may deem advisable or expedient;

**j. Settlement of Claims**

To settle, waive, release or compromise any claim or obligation of her, or owing to her, in her capacity as Trustee;

**k. Limited Liability**

To exclude her personal liability in any agreement or other transaction entered into by her in the course of the management of the Trust Fund or the administration of the trusts under this Deed;

**l. Professional Advice**

To act on information or advice obtained from any lawyer, accountant, valuer, broker, firm of investment dealers or any members thereof or any other adviser or expert and to pay for such information or advice out of the Trust Fund or out of the income therefrom as the Trustee may deem appropriate;

**m. Cash Deposits**

To deposit any money included in the Trust Fund with any chartered bank, duly registered trust company or financial institution in any jurisdiction.

**Incorporation**

To incorporate, or join with any other person or persons in the incorporation of any corporation and to sell or exchange any property included in the Trust Fund to any such corporation for securities of such corporation or for such other consideration as the Trustee shall deem advisable.

**n. Distribution**

To distribute any part of the Trust Funds in cash to the Beneficiary for such purpose as to determine conclusively the value of any property included in the Trust Fund;

**o. Signing Authority**

To appoint any other person or persons to sign all or any banking documents, stock transfers, receipts, promissory notes, other negotiable instruments and any other documents of any kind required to be signed on behalf of the Trust at any time;

**p. Documents of Title**

To hold securities in bearer form or duly endorsed for transfer in blank or to record or register the ownership of any securities or other investments or property included in the Trust Funds in the name of the Trustee or of any agent or nominee of the Trustee and to grant custody of any such securities, investments or property, or the documents of title relating thereto, to any agent or nominee of the Trustee;

**q. Income Tax**

To perform all of her obligations and to exercise all of her powers under the *Income Tax Act* to the extent that they may deem advisable or expedient and, in connection with any elections pursuant to the *Income Tax Act*, as amended, or any other determinations or designations to be made by the Beneficiary, to accept as valid and binding any such election or designation that purports to be made by any legal or de facto guardian on behalf of such Beneficiary; and

**r. Agents**

To appoint any person or persons to act as her agent and to delegate in writing to such agent all or any of the powers conferred upon the Trustee

under this paragraph 6 including, for greater certainty, the power to make and change investments on behalf of the Trust.

**7. APPOINTMENT OF NEW TRUSTEE**

In the event that the Trustee becomes unable or unwilling to act as Trustee, the Trustee may appoint a successor Trustee or Trustees to replace her. In the event that the Trustee dies or becomes incapable and has appointed an Executor or an Attorney under a General and Enduring Power of Attorney for Property, the Trustee's Executor, or Attorney, as the case may be, shall automatically become the successor Trustee. If the Trustee fails to appoint a successor, the Court may, on application of the Beneficiary or any Alternate Beneficiary, appoint a replacement Trustee.

**8. LIABILITY OF TRUSTEE**

All powers conferred upon the Trustee or upon her agents pursuant to this Deed shall be exercisable in the unfettered discretion of the Trustee or such agents, as the case may be, and no Trustee or agents acting honestly, in good faith and for the benefit of the Beneficiary, shall be liable for any act or omission in the purported exercise of any such power or in the performance of her obligations pursuant to this Deed or for any loss or diminution in value suffered by the Trust Fund unless such act, omission, loss or diminution in value constitutes, or is caused by, dishonesty, gross negligence or willful default of such Trustee or agents as the case may be. The Trustee shall, in regard to all powers, authorities and discretion vested in her by this trust agreement have absolute and uncontrolled discretion in the exercise thereof whether in relation to the manner or to the mode of such exercise and the Trustee, acting in good faith, shall in no way be responsible for any loss, costs, damages or inconveniences that may result to the Trust Fund or to any of the beneficiaries of the trusts hereby created from the exercise or non-exercise of any such power, authority or discretion. The Trustee shall exercise the powers and discretion given to or, conferred upon her in what she deems to be the best interests, whether monetary or otherwise, of the Trust Fund and/or of the Beneficiary of the trusts hereby created, and all such exercise of her powers and discretion shall be binding upon the Beneficiary of the trusts hereby created and shall not be subject to any question by any question by any person, official, authority, Court of tribunal. The Trustee shall be chargeable with the answerable only for her own gross neglect or willful default and shall be indemnified out of the Trust Fund in respect of all liabilities which she may incur in the execution of the trusts hereunder or in the exercise of the powers and/or discretion herein given the Trustee saving always any such liability (if any) as may arise as a consequence of her own gross neglect or willful default.

9. TRUST IRREVOCABLE

This Trust is irrevocable.

10. DESIGNATION OF TRUST

This Settlement is designated the EMMA SMITH TRUST and the Trustee and her agents may in that name hold title to any investments or other property included in the Trust Fund, carry out any transactions on behalf of the Trust and enter into any contracts or arrangements or otherwise exercise any of the powers, discretion or authorities conferred upon her in this Deed.

11. ACCEPTANCE

The Trustee accept the trusts under this indenture and agrees to administer the same in accordance with the provisions hereof. In any provision herein is or becomes in contravention of any application law or statute, such provision may be voided or deleted by the Trustee in writing and deemed to be severed from this Trust Deed, provided always that the remaining provisions herein shall continue to be valid and binding and the trust established herein shall continue without such deleted or voided provision.

12. GOVERNING LAW

This indenture shall be governed by and construed according to the laws of the Province of Ontario, Canada.

IN WITNESS WHEREOF the parties have executed this Settlement

SIGNED, SEALED & DELIVERED  
in the presence of:

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)  
)  
)  
)  
)  
)  
)  
)  
)

\_\_\_\_\_

(Settlor)

\_\_\_\_\_

(Trustee)

## SCHEDULE "C"

From Beatty, Harry, "Advising the *Ontario Disability Support Program* Recipient or Applicant who has received an Inheritance or Insurance Proceeds', January 2004

**THIS DEED OF TRUST** made the \_\_\_\_\_th day of \_\_\_\_\_, 2003.

### B E T W E E N:

**A** of the City of Toronto, in the Province of Ontario (called the "Settlor")

OF THE FIRST PART

- and -

**C**, of the City of Toronto, in the Province of Ontario, (called the "Original Trustee")

OF THE SECOND PART

### WHEREAS:

1. The Settlor wishes to provide for his/her future welfare and for this purpose has determined to constitute a trust (called the "**A TRUST**") naming himself/herself as the sole lifetime beneficiary and appointing **C** as the Original Trustee to receive the Trust Property hereinafter mentioned to be held by him/her in trust and administered as set forth.
2. The Settlor receives financial benefits from the Government of Ontario under the authority of the *Ontario Disability Support Program Act, 1997* and wishes to maintain his/her eligibility for these and any future benefits authorized under this or successor legislation.
3. The Settlor intends that the **A Trust** not be an asset for the purpose of calculating his/her entitlement to receive income support under the *Ontario Disability Support Program Act, 1997*, or any successor legislation that provides benefits for people with disabilities.
4. The Settlor's \_\_\_\_\_, **D** died on the \_\_\_\_\_, 2003 and the Settlor has received proceeds of \_\_\_\_\_dollars (\$\_\_\_\_) from a policy of life insurance owned by his/her said \_\_\_\_\_and has been informed that he will receive a bequest from his/her said \_\_\_\_\_'s estate. The Settlor intends to settle the said proceeds of life insurance and the said bequest, including any

income accumulated on the said proceeds or the said bequest prior to this date, on the **A Trust**.

5. The Settlor appoints **C**, as the Original Trustee to receive the Trust Property hereinafter mentioned, to be held by the Trustee in trust to be administered as set forth.
6. The Settlor has paid or transferred to the Original Trustee the trust property as set out in Schedule A hereto and has directed the Executors of his/her late \_\_\_\_\_'s estate to direct all distributions from his/her \_\_\_\_\_'s estate to the Trustee to be held pursuant to this Deed of Trust.
7. The Original Trustee has agreed to act as Trustee under this Trust and to accept and hold any property forming part of the Trust Property (defined in this agreement) subject to the Trusts now declared.

**NOW THEREFORE** in consideration of the covenants contained in this agreement, it is agreed among the parties as follows:

**1. Definitions and Interpretation**

In this Trust (including this paragraph) and in any instrument supplemental or ancillary hereto, unless the context otherwise requires,

- (a) "Trustee" means the trustee or trustees from time to time acting under this Trust and shall include the Original Trustee and any substitute or additional trustee or trustees appointed pursuant to the provisions of paragraph 10 hereof.
- (b) "Beneficiary" means **A**, of the \_\_\_\_\_ in the Province of Ontario.
- (c) "Annual Net Income" means all of the income derived from the Trust Property, less the aggregate of:
  - (i) expenses incurred or payable in each year in respect of or to protect the Trust Property or incurred or payable in each year in connection with the management and administration of the Trusts

now set out as determined by the Trustee to be chargeable to income;

- (ii) such or other sums in each year as the Trustee in his or her sole discretion considers to be proper allowances, reserves, deductions, and disbursements in accordance with generally accepted accounting principles; and
  - (iii) without limiting the generality of the foregoing, such sum in each year as the Trustee shall in his or her absolute discretion consider necessary and advisable from time to time as being on account of depletion, deterioration, or obsolescence of any of the assets comprising the Trust Property,
- (d) The "Trust Property" means the property set out in Schedule "A" hereto, together with all amounts accumulated by the Trustee and such additional property which the Settlor or others may at any time pay and transfer to the Trustee and which the Trustee, in the exercise of an unfettered discretion, accepts and adds to the Trust Property to be held by him or her on the Trusts now set out, and shall include all property in which the same may be invested by the Trustee, or into which the same may be converted by the Trustee, at any time, as well as any additions or accretions thereto; further provided that in deciding whether to accept any additional settlement of property, whether paid or transferred by the Settlor or another person, the Trustee shall consider the advantages of maintaining **A** as the Settlor of the Trust for the purposes of the *Income Tax Act* (Canada) and further whether accepting such property will deprive the Beneficiary of his entitlement to receive income support pursuant to the Ontario Disability Support (for example, if the property were not an inheritance or the proceeds of a policy of life insurance).
- (e) Any reference in this Trust to a statute, regulation or rule means the statute, regulation, or rule as it shall be from time to time amended.

(f) This Deed of Trust and any instrument supplemental or ancillary thereto shall be read with such changes of gender or number as the context may require.

**2. Name of the Trust**

The Trust created by this agreement shall be known as the "**A Trust**".

**3. Trust Property**

The Settlor has paid or transferred to the Original Trustee the trust property as set out in Schedule "A" hereto, which is to be held in trust for the Beneficiary by the Trustee subject to the trusts hereof and has directed the executor's of his/her late \_\_\_\_\_'s estate to pay all distributions from that estate to the Trustee to be dealt with pursuant to the terms of this Deed of Trust.

**4. Purposes of Trust**

The Trustee shall hold the Trust Property in trust for the Beneficiary and, during the lifetime of the Beneficiary, pay, from time to time, to or for the maintenance, education, advancement in life, benefit, or support of the said Beneficiary such part or parts of the annual net income derived from the Trust Property, and such part or parts of the capital thereof, as the Trustee may from time to time consider necessary or advisable, with the intent that the assets of the **A Trust** shall be available to be used for the Beneficiary's maintenance as required by paragraph 19 of s.28(1) of Ontario Regulation 222/98 made pursuant to the *Ontario Disability Support Program Act, 1997*, or by any provision of like import contained in any successor regulation, in law or in function, thereto made pursuant to the said *Act* or to any successor statute, in law or in function, thereto.

Any net income earned in a year from the Trust Property which is not so paid or applied in that year or within three months thereafter shall be accumulated by the Trustee and added to the capital of the Trust Property as at the end of that year, to be dealt with as part thereof, provided that in each year after the expiration of the maximum period, if any, permitted by law for the accumulation of income hereunder, if the Trustees are then holding the whole or any portion of the Trust Property they shall pay to, or apply for the benefit of, the Beneficiary the whole of

the net income derived from the Trust Property in that year. Without limiting the generality of the foregoing, the Trustee shall have the authority to accumulate capital as contemplated by paragraph 10 of s.43(1) and s.43(2) of Ontario Regulation 222/98 made pursuant to the *Ontario Disability Support Program Act*, 1997, (hereafter the "Act") or by any provision of like import contained in any successor regulation, in law or in function thereto, made pursuant to the said Act or to any successor statute, in law or in function thereto.

**5. Death of Beneficiary**

On the death of the Beneficiary, the Trustee shall pay or transfer all the Trust Property, or any part thereof then remaining to **F** and **G** in equal shares per capita; provided that if either of them is not then alive, but has left issue him or her surviving and then alive, the share to which such deceased person would have been entitled if then alive shall be divided among his or her issue then alive in equal shares per stirpes.

**6. Powers and Authorities of Trustees**

Without in any way limiting or derogating from the powers, authorities, discretions and immunities otherwise available to the Trustee, whether under any statute or at law or otherwise, the Trustee shall have the following powers, authorities, discretions, and immunities, and as to which his or her judgment shall be final and conclusive in relation to all interested parties, and no person dealing with him or her shall be charged with any duty to inquire into the propriety of his or her actions:

- (a) Investments. To invest or reinvest the Trust Property and sell (whether by public or private sale or with or without notice, for cash or on credit, or partly for cash and partly on credit), assign, transfer, exchange, pledge, convey, lease, mortgage, or otherwise dispose of or encumber the Trust Property or any part thereof at any time or from time to time as the Trustee in his or her absolute discretion may deem advisable, and at such price or prices and on such terms as he or she may consider advisable, which terms may extend beyond the duration of the Trust.

- (b) **Retention of Assets.** The Trustee may make or retain any investment or investments that he or she considers advisable notwithstanding that such investments may not be in the form of investments in which trustees are authorized to invest trust funds under the laws of the Province of Ontario or any jurisdiction of Canada. Such investments may include any mutual funds or private mutual funds or pooled investments, including one or more of the common trust funds administered by a trust corporation who may be appointed as a substitute Trustee for the Trust Property. The Trustee shall not be responsible for any loss which may be occasioned by reason of the making of such investments or the retention of the same. The Trustee shall further have the authority to retain such investment counsellor or portfolio manager, (including an affiliate of any trust corporation acting hereunder as the Trustee), in the exercise of an unfettered discretion, considers advisable, and to delegate to such investment counsellor or portfolio manager the authority to purchase and sell securities. The Trustee may exercise this authority to delegate his or her discretion or responsibility to make or manage investments.
- (c) **Purchase from Settlor.** Notwithstanding anything in this agreement or any rule of law to the contrary, to receive, purchase and acquire, at any time, as an investment, and to hold as part of the Trust Property, any share, securities, or property owned by the Settlor, or owned by any other person or company or corporation, at such price or prices and upon such terms as may be deemed desirable or expedient by the Trustee, and the decision of the Trustee in this regard shall be final and binding.
- (d) **Securities Transactions.** To vote all shares and stocks forming part of the Trust Property, and to exercise all rights incidental to the ownership of shares, stocks, bonds, debentures, or other securities or investments forming part of the Trust Property and to issue proxies therefor to others; and to vote for the election of an appropriate officer or employee to any executive or other board or committee of any such company or corporation or association, and to serve in any such office or on any such

board or committee and accept and receive remuneration for such services without diminution of his or her compensation as Trustee; to sell or exercise any subscription rights and, in connection with the exercise of subscription rights, to use any portion of the Trust Property for such purpose; to consent to and join in any plan for reconstruction, reorganization, amalgamation, consolidation, or readjustment in respect of any company or corporations whose shares, stocks, bonds, debentures or other securities for the time being form part of the Trust Property or for the sale of assets and undertaking, or a substantial portion thereof, of any such company or corporation, and in pursuance of any such plan, to accept any shares, stocks, bonds, debentures, or other securities in exchange for shares, stocks, bonds, debentures, or other securities then forming part of the Trust Property as fully and effectually as if the same were not Trust Property but always in such manner as the Trustee shall, in his or her unfettered discretion consider to be in the best interests of the Beneficiary.

- (e) **Proxy.** To appoint some person or persons as his or her proxy or proxies to vote shares and stocks.
- (f) **Title to Assets.** To register any property in the names of his or her nominee(s) or in his or her own name or to hold the same unregistered or in any such form that title shall pass by delivery, but without thereby increasing or decreasing his or her liability as Trustee.
- (g) **Distribution in Specie.** The Trustee may make any payments, provisions, apportionments, or distributions which may be required, or which he or she determines in the exercise of his or her discretion to make under the terms of this Trust, in whole or in part in moneys, securities, or other property comprising the Trust Property, and every apportionment and distribution from the Trust Property, and every valuation of the Trust Property or any article, part or item thereof, which in the unfettered discretion of the Trustee shall seem equitable, shall be final, conclusive, and binding upon the Beneficiary.

- (h) **Borrowing.** The Trustee may, in his or her unfettered discretion, borrow money from the Settlor and any other person(s) or organization(s), on security or without security from time to time, for any purpose connected with the administration of the Trust Property, upon such terms and conditions as he or she may deem advisable, and as security therefor he or she may mortgage, pledge, hypothecate or otherwise charge the Trust Property or any part thereof, and may make, execute, and deliver, under seal or otherwise, such notes, bonds, mortgages or other obligations as may be required.
- (i) **Lending.** To lend the Trust Property or any part thereof for any security which he or she in his or her absolute discretion may deem sufficient or upon any security.
- (j) **Valuation of Assets.** The Trustee may in his or her unfettered discretion determine, in the case of investments purchased or sold at a premium or discount or in the case of any moneys received, whether such premium, discount, or amount received shall be credited to, or charged against, capital or income; and shall further determine, in his or her absolute discretion, in case of receipt of stock dividends or stock holders' subscription rights or the proceeds thereof, in case the same should be sold, whether such receipts shall be credited to capital or income.
- (k) **Execution of Documents.** To execute and deliver agreements, assignments, bills of sale, contracts, deeds, notes, powers of attorney, receipts, and any other instruments in writing necessary or appropriate in the opinion of the Trustee for the settlement or administration of this Trust, and to execute any such instrument without warranty by or without recourse to the Trustee.
- (l) **Agents.** To employ and compensate agents, accountants, solicitors, brokers, and other assistants and advisers deemed by the Trustee to be helpful, for the proper settlement or administration of the Trust Property, and to do so without any liability for any neglect, omission, misconduct, or

default of any such employed person, if such person was selected and supervised with reasonable care.

- (m) **Elections.** The Trustee may make, or refrain from making, in his or her absolute discretion, any election or elections, (including a preferred beneficiary election pursuant to s.114(4) of the *Income Tax Act (Canada)*) any determination or determinations permitted by any statute or statutes or regulation or regulations enacted by the Parliament or government of the Dominion of Canada, by the legislature or government of any province of Canada, or by any other legislative or government body of any other country, province, state or territory, and such exercise of discretion by the Trustee shall be conclusive and binding upon the Beneficiary.
- (n) **Situs of Assets.** To hold the Trust Fund or any part or parts thereof at any place or places and to move the same from time to time from place to place inside or outside Ontario.

#### 7. Transfer of Trust Property to Other Trust

The Trustee may in his or her discretion from time to time transfer and convey the whole or any share or portion of the Trust Property to any other trust or settlement, whether established under or pursuant to the laws of Ontario or any other province of Canada or of any other jurisdiction whatsoever, to be held by the trustee(s) of such other trust or settlement, provided that such other trust or settlement shall not infringe the rule against perpetuities applicable to this Settlement and the Beneficiary of this Settlement shall be the sole beneficiary of such other trust or settlement. Insofar as the laws of the jurisdiction in which any such other trust or settlement is sited permit, the Beneficiary's interest in such other trust or settlement shall be substantially the same as his corresponding rights or interest with respect to the **A Trust** or any part thereof; further provided that the Trustee shall have the authority to transfer and convey the whole or any portion of the Trust Property to a trust or settlement for the purpose of preserving or enhancing the Beneficiary's entitlement to financial support or benefits from a public source, even if the Beneficiary's rights or interest in such trust or settlement are inferior to his corresponding rights or interests in the **A Trust**. For

greater certainty, the Trustee may terminate the **A Trust** by transferring the whole of the Trust Fund to another trust pursuant to this paragraph.

**8. Standard of Care and Liability of the Trustees**

The Trustee shall, at a minimum, be held to the same standard of care as is an attorney for property pursuant to the *Substitute Decisions Act*, 1992. The legal title to all the Trust Property shall be and remain vested in the Trustee and his or her successor(s). The Trustee shall have the power to bind the Trust Property without becoming personally liable.

**9. Exclusions from Net Family Property**

The income including capital gains, arising from any interest passing to the Beneficiary under this agreement shall be excluded from such Beneficiary's net family property pursuant to Ontario's *Family Law Act*.

**10. Appointment/Replacement of Trustees**

- (a) **C** shall be the Trustee until he/she becomes unwilling or unable to continue to act as a Trustee, in which case **H** shall be the trustee and upon his/her agreeing in writing to assume such office the trust property shall vest in him/her as though he/she were the original trustee hereunder.
- (b) Subject to subparagraph (3) below, the Settlor may, at any time during the term of this Trust, appoint another person or corporation to act as a Trustee in addition to, or in substitution for, the existing Trustee.
- (c) Any Trustee may at any time resign from the office of Trustee on giving not less than thirty (30) days' notice addressed to every other Trustee and the Settlor, or to the Settlor alone in the event that such resigning Trustee is the sole Trustee, such notice to be sent by registered mail or courier. Any such notice shall be sent to the address set out immediately below, unless the person sending the notice has previously received notice of a change of address by registered mail or by courier. It is the responsibility of the Settlor, Beneficiary and all Trustees of the **A Trust** to notify all other parties to the **A Trust** of any change in address, and in the absence of such notice, any such notice sent to an address given immediately below

or to the last address of which the trustee has received notice as hereinbefore provided, shall be deemed to be a proper and valid notice for all purposes of the **A Trust**. The said addresses are:

- (d) Notices of all changes in the trusteeship shall be endorsed on, or attached to, this agreement and shall be signed by the surviving or continuing Trustee(s) and every such notice shall be sufficient evidence to any person having dealings with the Trustee(s) for the time being hereof as to the facts to which it relates.

**11. Trust Revocable**

The Trusts set forth in this agreement shall be revocable by the Settlor upon written notice being actually received by the Trustee, such notice to be sent by registered mail or courier. Any such notice shall be sent to the address set out immediately below, unless the person sending the notice has previously received notice of a change of address by registered mail or by courier. It is the responsibility of the Settlor, Beneficiary and all Trustees of the **A Trust** to notify all other parties to the **A Trust** of any change in address, and in the absence of such notice, any such notice sent to an address given immediately below or to the last address of which the trustee has received notice as hereinbefore provided, shall be deemed to be a proper and valid notice for all purposes of the **A Trust**. The said addresses are:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

**12. Acceptance of Trust**

The Trustee, by joining in the execution of this agreement, signifies her acceptance of this Trust and the duties and obligations contained herein.

**13. Applicable Law**

This Trust shall be governed by, and construed in accordance with, the laws of the Province of Ontario, Canada.

**IN WITNESS WHEREOF** the Settlor and Trustee have set their hands and seals on the \_\_\_\_\_th day of \_\_\_\_\_, 2003 to this Deed of Trust written on this and \_\_\_ (\_\_) preceding pages.

SIGNED, SEALED AND DELIVERED )  
In the Presence of:

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